Supreme Court, U.S.
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No. 96-526

(3)

In The

Supreme Court of the United States

October Term, 1996

STEPHEN JOHNSON,

Petitioner,

v.

MARYLOU ZSCHACH,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Ohio

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

In her Brief in Opposition, the Respondent has (1) made erroneous contentions with regard to Mr. Johnson's Petition for Certiorari, (2) misstated this Court's jurisprudence on due process requirements for putative fathers in adoption proceedings, and (3) failed altogether to address central issues of this appeal. Mr. Johnson thus files this brief reply.

1. "Bait and Switch" Notice Does Not Satisfy the Due Process Clause

The Respondent fails completely to address the "bait and switch" consent process in the present case, the issue that is arguably the most serious in terms of its potential effect upon others. Where the Due Process Clause requires notice and an opportunity to be heard, courts simply cannot obtain the consent of a party to one agreement, radically change the terms of the agreement, and then hold that party bound to the new terms to which he did not even have notice and an opportunity to object. If they could, the concept of "consent" in all kinds of contexts would become meaningless. **Any** kind of decree, settlement, or order could be agreed to by a party, subsequently altered materially by the court, and then declared binding, without further notice or hearing, upon the helpless party. Not only would such a situation create an unbearable burden upon the courts (as attorneys would prudently advise clients never to consent to anything to avoid this risk), it obviously would not satisfy the requirements of the Due Process Clause.

Yet, that is exactly what occurred in the present case. The only notice and opportunity to be heard provided to Mr. Johnson occurred **before** the probate court changed the central element of the adoption order, without which Mr. Johnson's consent was, by its own terms, null and void. It is ludicrous to suggest that his not having objected to an adoption to which he **did** consent negated his due process right to object to an adoption to which he **did not** consent. The Respondent does not even address, let alone attempt to resolve, this problem.

2. Mr. Johnson Was Not Even Required to File an Objection

The Respondent is simply incorrect in her assertion that the consent of **any** putative father is required only if he has filed an objection. That is true only of putative fathers who have not signed the birth certificate or otherwise validated their paternity pursuant to R.C. 3107.06(F). Mr. Johnson, having signed the birth certificate, therefore was not even required to object to preserve his right to withhold consent (although he did in fact object). In *In re Adoption of Bowes,* 105 Ohio App. 3d 574, 664 N.E.2d 963 (1995), the court clarified that R.C. 3107.06(F) is properly read in the disjunctive:

> Although [a putative father] has the right to withhold consent under R.C. 3107.07(B), he may be precluded from doing so **if** he has not met **at least one** of the three requirements of R.C. 3107.06: (1) he must have signed the birth certificate and now [*sic*] a written consent to the adoption; **or** (2) he must have validated his paternity pursuant to R.C. 3107.06(F)(1), (2), or

> (3); **or** he must have timely filed an objection to the adoption under R.C. 3107.06(F)(4).
>
> Here [the putative father] **had neither validated his paternity nor signed the birth certificate. Therefore,** unless he filed timely objections, he had no right to contest the adoption.

Id. at 577, 664 N.E.2d at 965-66 (emphasis added). *See also In re Adoption of Greer,* 70 Ohio St. 3d 293, 301, 638 N.E.2d 999, 1005 (1994) ("Upon taking the actions described in R.C. 3107.06(F)(1), (2), and (3), putative fathers are vested with a significant right, *i.e.,* the right to withhold consent to the adoption. . . . Once vested with that . . . interest, such fathers may not be deprived of that interest in the absence of procedural due process requirements of adequate notice and an opportunity to be heard.").

The disjunctive reading of the R.C. 3107.06(F) is also compelled by the due process necessity of construing any exception to the consent requirements strictly in favor of the biological parents, *In re Adoption of Schoeppner,* 46 Ohio St. 2d 21, 24, 345 N.E.2d 608, 610 (1976), and by the rule of statutory construction requiring statutes to be construed so as to give effect to every portion of the statute. The objection requirement thus applies only to putative fathers who fall within R.C. 3107.06(F)(4), not those who, like Mr. Johnson, fall within R.C. 3107.06(F)(1) through (3). If this were not the case, subsections (1), (2), and (3) would be completely superfluous. *Greer,* 70 Ohio St. 3d at 300, 638 N.E.2d at 1005 ("The statute cannot, however, logically be read to require a putative father to comply with each and every subsection of division (F). . . . That being the case, it is unlikely that the

legislature intended that putative fathers falling within the scope of R.C. 3107.06(F)(1), (2), or (3) should also be required to comply with R.C. 3107.06(F)(4). . . . ").

3. Mr. Johnson's Right to Equal Protection of the Laws Was Violated

The Respondent argues that this case is distinguishable from this Court's decision in *Caban v. Mohammed*, 441 U.S. 380 (1979), because, she claims, Mr. Johnson failed to "demonstrate full commitment to the responsibilities of parenthood." First of all, this is not even true: contrary to the Respondent's assertion, the record does indeed contain ample evidence of Mr. Johnson's relationship with Cybele and his contributions, both personal and financial, to her support and upbringing. *See, e.g.*, Affidavit of Sharon Kraft, Supplement to Brief of Appellant Stephen R. Johnson in the Ohio Supreme Court. Second, the question of Mr. Johnson's Participation in Cybele's upbringing has never been litigated in this case: no one in this case, including the Respondent, ever even relied below on any allegation that Mr. Johnson had failed to communicate with, neglected, or otherwise abandoned Cybele. Nor has there ever been any judicial finding that Mr. Johnson failed in his duties to his daughter. No such hearing was ever held, and the court never issued any such finding.[1] The issue whether Mr. Johnson would not have met the

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[1] Indeed, the court could **not** have done so without a hearing. R.C. 3107.06(F)(4) (consent excused even for putative fathers falling within R.C. 3107.06(F)(4) only if "the court finds, **after proper service of notice and hearing**," that he has abandoned the child (emphasis added)).

appropriate standards has never been raised in this case, and any such determination without notice and an evidentiary hearing would be an obvious violation of due process. If the Respondent would rely on Mr. Johnson's alleged failure to perform his parental duties under Ohio law, she must first attempt to satisfy her burden of proof on that issue in a proceeding as required by both Ohio law and the Due Process Clause.

Finally, Mr. Johnson's involvement with his daughter goes well beyond the threshold set by this Court for excusing a consent requirement. The Respondent, in her use of the language "demonstrating full commitment to the responsibilities of parenthood," overstates the standard set forth by this Court in *Caban*, 441 U.S. at 392 (putative father must "come forward to participate in the rearing of" the child), and *Lehr v. Robertson*, 463 U.S. 248, 267 (1983) (putative father held to standard of "shoulder[ing] significant responsibility for the daily supervision, education, protection, or care of the child") (quoting *Quilloin v. Walcott*, 434 U.S. 246, 256 (1978)). The standard set forth in the pertinent statues is even farther from the one the Respondent proposes: the consent even of a putative father who falls under R.C. 3107.06(F)(4) cannot be excused for failure to "demonstrate full commitment to the responsibilities of parenthood," but only if (after proper notice and hearing) he has been found by the court to have "willfully abandoned or failed to care for and support the minor." R.C. 3107.06(F)(4). Mr. Johnson has never abandoned or failed to care for his daughter, nor is there ever any such allegation anywhere in the record. To the contrary, he participated actively in her

care and support. Mr. Johnson has satisfied the standards set forth in *Caban, Lehr,* and *Quilloin*. Therefore, he was entitled to the notice and hearing which was denied.

4. Mr. Johnson Has Relied Only on Matters Wholly Within the Record

The Respondent erroneously claims that Mr. Johnson has relied on matters outside the record.[2] The Respondent evidently has misconstrued the scope of the term, "record". The record of a case includes, *inter alia,* all pleadings, affidavits, documents and exhibits filed in the court or courts below. *See* U.S. Sup. Ct. R. 12.7; Ohio Sup. Ct. R. 5, § 1 (App. 2). Everything relied upon in Mr. Johnson's petition for certiorari is supported by documents properly contained in the record.

The Respondent may be confusing matters of record with matters adjudicated by the courts below. Ironically, the very fact there was no adjudication of the matters referred to by the Respondent is a consequence of the

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[2] In fact, it is the Respondent who has made numerous excursions outside the record. Many are inconsequential (*e.g.*, the fanciful and irrelevant allegation, made for the first time in the Brief in Opposition, that Mr. Johnson visited Cybele primarily to see Ms. Zschach, and the allegation that Cybele "is currently in a loving, nurturing home environment"). More serious is the Respondent's incorrect and unsupported contention that Mr. Johnson failed to demonstrate a commitment to his daughter.

probate court's improper failure to hold a hearing on the final adoption decree.

Respectfully submitted,

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APPENDIX

United States Supreme Court Rule 12: Review on Certiorari: How Sought; Parties

Section 7. The clerk of the court having possession of the record shall keep it until notified by the Clerk of this Court to certify and transmit it. In any document filed with this Court, a party may cite or quote from the record, even if it has not been transmitted to this Court. When requested by the Clerk of this Court to certify and transmit the record, or any part of it, the clerk of the court having possession of the record shall number the documents to be certified and shall transmit therewith a numbered list specifically identifying each document transmitted. If the record, or stipulated portions, have been printed for the use of the court below, that printed record, plus the proceedings in the court below, may be certified as the record unless one of the parties or the Clerk of this Court requests otherwise. The record may consist of certified copies, but if the lower court is of the view that original documents of any kind should be seen by this Court, that court may provide by order for the transport, safekeeping, and return of such originals.

Ohio Supreme Court Rule 5: Transmittal Of Record On Appeal

Section 1. Composition of the record on appeal

In all appeals, the record on appeal shall consist of the original papers and exhibits to those papers; the transcript of proceedings and exhibits, along with a computer diskette of the transcript, if available; and certified copies of the journal entries and the docket prepared by the clerk of the court or other custodian of the original papers.